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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1588

WILLIAM T. ANDERSON, *et al.*, *Petitioners*

v.

UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims

BRIEF FOR INTERVENOR IN OPPOSITION

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BRIEF FOR INTERVENOR IN OPPOSITION

OPINION BELOW

The decision below appears in 490 F.2d 921 (Ct. Cl. 1974). A copy of the decision is attached to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

REFORMULATION OF QUESTIONS PRESENTED

The questions as formulated by Petitioners, in our view, are argumentative and insufficient, tending both to overstate and to beg the questions presented by this

case. Since the issues which this Court is asked to review are for that reason somewhat obscured, we have restated the questions in the following form:

1. Whether the basic hourly rate of pay of the Alaska Railroad operating employees,[1] as fixed and adjusted from time to time, in accordance with the prevailing wage system in the industry, by the Secretary of Transportation in negotiation with Intervenor, acting as the recognized collective bargaining representative of such employees, all as contemplated by the Alaska Railway Act of 1914[2], is the actual hourly rate of pay upon which to compute premium pay for overtime hours under 5 U.S.C. § 5544.

2. Whether the Secretary of Transportation and the Intervenor acting as the recognized collective bargaining representative of the operating employees of the Alaska Railroad in establishing and maintaining a system of pay through collective bargaining in accordance with the prevailing wage system in the industry as contemplated by the Alaska Railroad Act may agree that the weekly wage of the operating employees should be determined upon the basis of the number of hours worked each work day and each work week multiplied by the basic hourly rate of pay with premium pay of one and one-half times such basic hourly rate for overtime hours or by a dual system of pay based upon the mileage rate, multiplied by the number of miles traversed each work day and each work plus payment for arbitraries as defined in the

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[1] The Locomotive Engineers, Locomotive Firemen, Conductors, Brakemen, Baggagemen and Hostlers.

[2] Act of March 12, 1914, 38 Stat. 305, 43 U.S.C. § 975.

collective bargaining agreement, whichever of the two is higher.

3. Whether on-call time under the extra-board arrangement constitutes hours worked for the purposes of determining whether hours worked by the extra-board employees exceed 40 hours in a work week within the meaning of 5 U.S.C. § 5544(a).

4. Whether the overtime provisions prescribed by 5 U.S.C. § 5544 are satisfied by the payment of premium pay for all hours exceeding eight in any work day or 40 in any work week, whichever is greater.

STATUTES INVOLVED

The pertinent provisions of Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 486; Pub. L. 90-83, Sec. 1(26)(A), Sept. 11, 1967, 81 Stat. 200; 5 U.S.C. § 5544 are set forth in the Petition at pp. 3-4. Also involved in this matter are the following statutes:

Act of Mar. 12, 1914, c. 37, § 1, 38 Stat. 305, 43 U.S.C. §§ 975, 975f.

> 43 U.S.C. § 975. "Alaskan railroads; location, construction, and operation; passes.
>
> "The President of the United States is empowered, authorized, and directed to adopt and use a name by which to designate the railroad or railroads and properties to be located, owned, acquired, or operated under the authority of sections 975 to 975(g) of this title; to employ such officers, agents, or agencies, in his discretion, as may be necessary to enable him to carry out the purposes of said sections; to authorize and require such officers, agents, or agencies to perform any or all of the duties imposed upon him by the terms of said sections; . . . to receive compensation for the transportation of passengers and

property, *and to perform generally all the usual duties of a common carrier by railroad;* to make and establish rules and regulations for the control and operation of said railroad or railroads; (Emphasis supplied.)"

43 U.S.C. § 975f. "Same; authority of President.

"It is the intent and purpose of Congress through the provisions of sections 975 to 975g of this title to authorize and empower the President of the United States, and he is fully authorized and empowered, through such officers, agents, or agencies as he may appoint or employ, to do all necessary acts and things in addition to those specially authorized in said sections to enable him to accomplish the purposes and objects of said sections."

Pub. L. 89-670, § 6, Oct. 15, 1966, 80 Stat. 937, amended Pub. L. 92-401, § 6, Aug. 22, 1972, 86 Stat. 617, 49 U.S.C. § 1655(i).

"Alaska Railroad.

"(i) The administration of the Alaska Railroad, established pursuant to the Act of March 12, 1914, as amended (38 Stat. 308), and all of the functions authorized to be carried out by the Secretary of the Interior pursuant to Executive Order Numbered 11107, April 25, 1963 (28 F.R. 4225), relative to the operation of said Railroad, are hereby transferred to and vested in the Secretary of Transportation who shall exercise the same authority with respect thereto as is now exercised by the Secretary of the Interior pursuant to said Executive order."

RESTATEMENT OF THE CASE

Petitioners are current or former extra-board operating employees of the Alaska Railroad (hereinafter the "Railroad"), who have been paid pursuant to collective bargaining agreements negotiated by the Railroad and by the Intervenor, the United Transportation Union, acting on behalf of the operating employees as their recognized representative. Historically, the wage fixing authority for the Railroad (the Secretary of Interior prior to October 15, 1966,[3] and the Secretary of Transportation thereafter[4]) has followed the collective bargaining processes governing labor relations in the railroad industry in accordance with the mandate in the Alaska Railway Act "to perform generally all the usual duties of a common carrier by railroad", 43 U.S.C. § 975. Thus, the Alaska Railroad has conformed its classifications and its pay scales to the practices of the railroad industry. Specifically, in its negotiations with Intervenor it has coordinated its wage system with that prevailing on the Northern Pacific Railroad, adjusted by a cost of living differential reflecting differences between the Alaska areas and the various cities in the Continental United States. The rates prescribed by the collective bargaining agreement covering Petitioners and the other operating employees of the Railroad are in this way derived from the wage system prevailing in the

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[3] Pursuant to Executive Order No. 11107 of April 26, 1963, 28 F.R. 4225, superseding Executive Order No. 3861 of June 8, 1923.

[4] The administration of the Railroad in all functions to be carried out by the Secretary of the Interior were transferred to and vested in the Secretary of Transportation. Pub. L. 89-670, § 6, October 15, 1966, 80 Stat. 937, 49 U.S.C. § 1655(i).

collective bargaining agreements with the Northern Pacific Railroad.

The decision of the Court of Claims in *Samples* v. *United States,* 135 Ct. Cl. 538 (1966) required a variation from the pattern which had existed prior to that time. It was upon this basis that the Roalroad and the Intervenor shortly thereafter modified their historic wage system to accommodate the two distinct pay systems contemplated by the *Samples* decision: first the "dual pay system" (that which prevails in the railroad industry and which has been consistently followed by the Alaska Railroad) which is made up of a system of payment for miles run, hours worked, overtime hours, and "arbitraries"; and second the "statutory system" which provides for a payment of the employees' basic hourly rate of pay and the payment of one and one-half times the basic hourly rate of pay for hours worked in excess of eight hours a day or 40 hours a week, whichever is greater. The computations of pay earned under the dual or mileage system with its arbitraries and the statutory system with time and one-half for overtime hours are compared on a weekly basis; the employee is paid the larger of the two sums. This assures that the employee will be paid at least as much as the amount set out in 5 U.S.C. § 5544 and at the same time preserves and maintains the historic wage system prevailing throughout the American railroad industry.

The dual wage system was characterized by the Court of Claims in its decision below as "possibly the most complex mode of calculating compensation for personal services that the mind of man has even devised" (Appendix to Petition at p. 2). It represents approximately a century of experience in the railroad industry

in developing a wage system which reflects the unique and special conditions of employment in rail transportation. Essentially it is a method of compensating railroad employees upon the basis of a rate for miles run or hours worked, whichever is greater, computing the basic day of eight hours to be 100 miles and the hourly rate of pay to be twelve and one-half times the rate of pay for one mile. Trains may run fast or slow and time on a run may be lost in terminals, breakdowns, switching operations or in other similar circumstances. Trains frequently may cover substantially more or substantially less than 100 miles in any one day. If more than 100 miles are covered, the employee is paid for actual miles run. If less than 100 miles are covered in an eight-hour day, the employee is paid by hours which for payroll purposes are converted to miles on the basis of the formula prescribing twelve and one-half miles for each hour.

In addition to the payment of mileage or hours, the collective bargaining agreement covering Petitioners and other operating employees of the Railroad provides as a part of the wage system a wage component designated "arbitraries" which are payable in a number of circumstances arising in the operation of the railroad, in accordance with the standard practice of American railroads. Arbitraries include payment for dual system overtime premium pay, additional work performed which the employee is not ordinarily required to perform, compensation for not having work available when the employee is scheduled to work under the work rules and payments for inconveniences or penalties in various other circumstances.

The payment of arbitraries is an integral part of the dual wage system which has become thoroughly estab-

lished in the railroad industry. Following the *Samples* decision, the Railroad and the Intervenor agreed in collective bargaining, that arbitraries would be retained as a component of the dual wage system, but would not be included in compensation for those weeks in which compensation was due and payable under the statutory system. Thus, under the terms of the collective bargaining agreement, compensation earned under the dual system including arbitraries during any given work week is compared with compensation payable under the statutory system, and the higher of the two sums is paid to the employees for such period.

ARGUMENT

I. The Issues Presented by the Petition Do Not Involve Questions of Importance to the Administration of Any Federal Statute.

The decision of the Court of Claims in this case is limited in its application to the employees of the Alaska Railroad and can hardly be characterized as involving a question of importance to the administration of 5 U.S.C. § 5544. As pointed out by the Court of Claims, the wage system in the railroad industry is "possibly the most complex" ever devised by the mind of man and its juxtaposition to the Federal overtime statute is confined to the facts of this case alone. The manner in which the Federal overtime law affects the dual wage system prescribed by the collective bargaining agreement covering the operating employees of the Alaska Railroad was considered by the Court of Claims in *Samples* v. *United States, supra,* in which the Court established the basis for an accommodation of the two wage systems, preserving the one and at the same time giving effect to the policies of the other. It was there held that the statute in its application to the unique

facts of employment of operating employees of the Railroad requires no more than the payment of higher wage as computed under the respective wage systems; if the dual system produced a wage exceeding the statutory system, payment would be under the dual system; otherwise payment would be under the statutory system.

The basic hourly rate as fixed by the Railroad (by the Secretary of Interior at that time under Presidential delegation) and the collective bargaining representative of the operating employees was not challenged in *Samples* and was applied by the Court of Claims to the foregoing formula. Nor was the question of the inclusion or exclusion of arbitraries raised because, as the Court below observed, "there was at that time no agreement, custom, or practice, making arbitraries other than uniformly applicable. Now there is." (Appendix to Petition at p. 8.) Petitioners in this proceeding challenged (1) the bona fides of the basic hourly rate as established by the agreement and (2) the bona fides of the post *Samples* modified wage provision in which arbitraries were retained as a component of the dual system only.

As pointed out above, the decision of the Court of Claims in *Samples* and in its decision here interpreting and applying *Samples* is of limited impact and does not present a question of sufficient Federal significance to warrant issuance of the writ. The decision in the foregoing respect does not affect the wage system of employees employed by any other railroad or by any industry in the United States.

Nor does the on-call issue raise a Federal question of any greater significance than the questions considered above. Petitioners, as extra-board employees, are free to come and go when off duty, but they must report

to work within one and one-half hours of notice throughout the week. It has been consistently held that an employee who is not required to remain at a specific place designated by the employer while awaiting an assignment and whose liberty of movement and of activity is no more constrained than in this case is not serving in a working capacity and that, in consequence, his on-call time cannot be counted as working hours. *Aldrich* v. *United States,* 202 Ct. Cl. . . . , 479 F.2d 1365 (1973); *Detling* v. *United States,* 193 Ct. Cl. 124, 432 F.2d 462 (1970); *Rapp* v. *United States,* 167 Ct. Cl. 852, 340 F.2d 635, (1964).

The final issue raised below refers to the calculation of premium pay for daily and weekly hours. Petitioners challenged the practice of the Railroad in calculating premium pay upon the basis of daily and of weekly overtime and of including in the wage the greater of the two sums. The Department of Labor in its administration of the Public Contracts Act. (49 Stat. 2036 (1936), 56 Stat. 277 (1942), 41 U.S.C. § 35(c)) has consistently interpreted comparable overtime provisions to require the payment of the greater of daily or weekly overtime pay. See Department of Labor Rulings and Interpretations No. 3 § 42(c) (January 31, 1961). While we respectfully disagree with the Department's long time interpretation of these comparable provisions, it appears clear that this question has not been sufficiently considered by the lower courts to justify review by the Supreme Court at this time.

II. The Decision Below Is Not in Conflict with the Decisions of This Court.

The Court of Claims reviewed the various decisions of the Supreme Court under the Fair Labor Standards Act of 1938 as amended (29 U.S.C. 201), upon which

Petitioners rely and correctly concluded that its decision herein is consistent with the decisions of this Court. The cases with respect to which Petitioners claim conflict involve attempts to establish artificial or fictitious rates of pay either by contract or by practice. The basic daily rate for operating employees fixed by the agreement between the Railroad and the Intervenor, as pointed out above, reflects the rate system prevailing on the Northern Pacific Railroad as contemplated by the Alaska Railway Act. No one could possibly question the bona fides of the rates established on the Northern Pacific. The bona fides of the rates on the Alaska Railroad, derived as they are from the Northern Pacific, are no less bona fide. The rates established on the Alaska Railroad belong to the same family of rates prevailing in the Continental United States and are the result of careful and difficult negotiations over long periods of time, marked by the action of Presidential emergency boards, by litigation, and by legislation as experienced in recent years.

Where the regular hourly rate established by contract is genuine, as in this case, it forms the basis for computing overtime pay required by the Fair Labor Standards Act. As Justice Frankfurter observed in his concurring opinion in *Walling* v. *Harnischfeger,* 325 U.S. 427, 433:

> "Nor does the Act bar an agreement establishing an hourly regular rate that does not fall short of the statutory minimum even though it be complicated by a guaranteed weekly lump sum wage adapted to the circumstance of a particular employment, *provided it is not a mere artifice unrelated to wage earning actualities."* Citing *Walling* v. *A. H. Belo Corp.,* 316 U.S. 624; *Walling* v. *Helmerich and Payne,* 323 U.S. 37.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 23rd day of May, 1974, three copies of the Brief for Intervenor in Opposition were mailed, postage prepaid, to Robert H. Bork, Esquire, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, and Joseph A. Klausner, Esquire, 1028 Connecticut Avenue, N.W., Washington, D.C. 20036, Attorney for Petitioners. I further certify that all parties required to be served have been served.

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